STATE OF MICHIGAN

COURT OF APPEALS

THOMAS JOHN KABALA, JR.,

Plaintiff-Appellant,

v

JP MORGAN CHASE BANK, N.A., a/k/a J.P. MORGAN CHASE & CO, a/k/a CHASE BANK USA, DANA RENEE TAYLOR, GERALD MILLIKEN, DOMINIQUE MILES, and BEN RIVERA,

Defendants-Appellees.

UNPUBLISHED
April 15, 2010

No. 288896
Wayne Circuit Court
LC No. 08-112000-CZ

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants. We affirm.

On April 9, 2007, an unidentified man attempted to rob a Chase bank in Westland. Bank teller Dana Renee Taylor was the person confronted by the unidentified man. The man left without obtaining any money. A police officer, knowing that defendant's father had been convicted of armed robbery and allegedly suspecting that defendant "might be following in his father's footsteps," included defendant's photograph in a photographic lineup presented to Taylor on May 23, 2007. Taylor indicated that she was "very certain" that defendant was the perpetrator. The officer later discovered that defendant owned a vehicle similar to that in which the suspect had fled after the bank robbery attempt.

The police later arrested defendant. Defendant filed a notice of alibi, with supporting witnesses indicating that, at the time of the robbery, defendant was en route to an opera rehearsal in Detroit. Defendant also took and passed a polygraph examination, and the charges against him were dropped.

On May 9, 2008, plaintiff filed a complaint alleging counts labeled as (1) negligent identification, (2) defamation per se, (3) injurious falsehood, (4) liability under respondeat superior, (5) negligent training and supervision, (6) false arrest and false imprisonment, and (7) negligent infliction of emotional distress.

Plaintiff first argues that the trial court erred in granting summary disposition to defendants because the bank and its employees had a duty to refrain from "wrongfully misidentifying innocent citizens."

We review de novo a trial court's decision concerning a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). As stated in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998):

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews . . . a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. In a negligence action, summary disposition is proper if it is determined as a matter of law that the defendant owed no duty to the plaintiff under the alleged facts. [Citations omitted.]

Plaintiff argued below that the bank owed him a duty with regard to the misidentification. The trial court rejected this argument, stating:

> I guess we could sit here and discuss for any number of minutes the uncertainties of eyewitness identification and violent or potentially violent circumstances. The literature is replete with examples of people misidentifying other people, under these kind of circumstances. And we don't always know[] what bears on the human mind in terms of its ability to be sure or think it is sure of an identification.
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> It may appear to be absurd that this woman could have been certain, but that is of no moment here. The focus, if there is any, is clearly with the police. And I'm not sure I want to engage too much in that kind of discussion. But you could argue that the police officers given the evidence . . . should have discounted her identification from the beginning, or at least done a whole lot more investigation before they chose to make an arrest.
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> But given what I have before me, the misidentification does not – or I should say there has been no demonstration . . . that there is the duty asserted on the part of the Defendant bank.
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> * * *
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> I appreciate the argument, but we keep coming back to police conduct ultimately, and I'm not sure how police conduct[,] however improper, nefarious or incompetent could create a duty in the bank. I just don't see it.

We find no basis on which to disturb the trial court's ruling.

As he did below, plaintiff on appeal again focuses on *Adams v National Bank of Detroit*, 444 Mich 329; 508 NW2d 464 (1993), arguing that it supports his position in the instant case and requires that the trial court's ruling be reversed. In *Adams*, *id*. at 332, the plaintiff was arrested for fraudulent bank withdrawals; the withdrawals had actually been made by a person with a similar name. The plaintiff was arrested after a bank employee provided the police with the wrong address and telephone number. *Id*. at 333. In a plurality decision, the Court concluded that an action against the bank for false imprisonment was appropriate. *Id*. at 333 (LEVIN, J.), 343 (BOYLE, J.), 355 (CAVANAGH, C.J., and MALLETT, JJ.).

We find *Adams* distinguishable. In *Adams*, Justices BOYLE, CAVANAGH, and MALLETT referred to the opinion by Justice LEVIN. Justice LEVIN, in his opinion, stated:

> NBD [the bank] claims that the trial court erred in submitting the false imprisonment claim to the jury because its actions were not sufficient to meet the standard for instigation of, or participation in, a false arrest, and because the confinement was incident to a valid arrest pursuant to a facially valid warrant.
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> *A person is not subject to liability for false arrest where the person merely gives information to the police and the police use their own judgment in deciding whether to make an arrest*[.] *Lewis v Farmer Jack Div, Inc*, 415 Mich 212, 219 n 3; 327 NW2d 893 (1982). The trier of fact could properly find that this case is not within that rule.
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> *It appears that NBD did more than simply provide information to the police, and the trier of fact could find that the police did not use their independent judgment in making the decision to arrest.* NBD's internal security department conducted the investigation leading to the arrest. The West Bloomfield officer in charge of the case testified that he treats information received from the security departments of large corporations differently than information received from ordinary citizens. He indicated that he is more apt to rely on the security department's identification of the suspect. When an officer "act[s] on [the] judgment" of the defendant, "it may well be said that [the] defendant directed the arrest," and the trier of fact here could properly so find. [*Adams*, 444 Mich at 341-342 (opinion of LEVIN, J.; citation omitted; emphasis added).]

In the present case, unlike in *Adams*, there was no allegation of an "internal security department" investigation. Instead, Taylor merely "provide[d] information to the police . . . ." *Id*. at 341. Therefore, the rule stated in *Lewis*, 415 Mich at 219 n 3, applies: the police used their own judgment in making the arrest after receiving information from the bank, and thus the bank may not be held liable for the misidentification. The "negligent identification" count of the complaint was properly dismissed.

Plaintiff next contends that the trial court wrongly dismissed his claim of false arrest or false imprisonment. This argument is merely a rehash of the arguments pertaining to *Adams* and we thus reject it.

Plaintiff next contends that the trial court wrongly dismissed the claim of defamation per se.[1] We disagree. As noted in *Postill v Booth Newspapers, Inc*, 118 Mich App 608, 619-620; 325 NW2d 511 (1982):

> In the common law of defamation, a defense of privilege exists. The defense of privilege is a matter of public policy that some communications are so necessary that, even if defamatory, they should be made. Therefore, the publisher is protected from liability by the privilege defense. Privileged communications may be either absolutely privileged or qualifiedly privileged. The difference between absolute and qualified privileges is that the latter affords the publisher protection only in the absence of ill will, spite, or malice in fact.

"The question of whether a qualified privilege exists in a particular case is one of law to be decided by the trial court, based on the circumstances surrounding the publication." *Peisner v Detroit Free Press*, 82 Mich App 153, 163; 266 NW2d 693 (1978).

A qualified privilege encompasses communications made when the person making the statement in question owes a duty to another, who in turn owes some type of duty. *Timmis v Bennett*, 352 Mich 355, 368; 89 NW2d 748 (1958). The Court in *Timmis* stated:

> We think the doctrine of qualified privilege may properly be regarded as including statements made in good faith by a citizen of a community having, or claiming to have, special knowledge or information bearing on [a] . . . matter of public concern and communicated to others concerned or interested. [*Id*. at 369.]

The trial court in this case essentially held, through implication, that Taylor's identification of defendant was privileged, and we agree. Indeed, Taylor claimed to have "special knowledge . . . bearing on [a] matter of public concern . . . ." *Id*. Plaintiff simply did not set forth a sufficient claim of "ill will, spite, or malice in fact," see *Postill*, 118 Mich App at 620, to survive a motion for summary disposition. Plaintiff merely alleged that Taylor chose defendant out of a photographic lineup and that this identification was later found to be incorrect. Although

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[1] The trial court did not make separate legal ruling with regard to each of plaintiff's theories of liability, instead making a general ruling as follows:

> On a personal level, I enjoy new theories of liability, and that's what part of lawyering is all about. But I just don't see how I can treat this as anything other than a (C)(8) motion, and I don't know how we get around [defense counsel's] arguments, even if we chose to do so.
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> This certainly is a fit subject, I think, for an appellate court. Perhaps they would enjoy to hear your arguments, but the public policy arguments here carries [sic] the day, whether this victim of the robbery, the bank employee, was certain or not certain, or even careless. *I believe there is no cause of action that accrues against the bank under any theory that I see.* [Emphasis added.]

plaintiff alleged that Taylor acted "with reckless disregard for truth, or, at a minimum without due care to ensure that the accusations were true," we find that these general allegations were insufficient. See *Smith v Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989) ("plaintiff's complaint presented no supporting facts on the question of malice, but made only general allegations that defendant . . . 'maliciously uttered' the challenged statement"). Moreover, mere "insufficient investigation" before the issuance of a statement does not support a finding of malice. *Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 751 (1984). We find no basis on which to reverse the dismissal of plaintiff's defamation claim.

Plaintiff next argues that the trial court erred in dismissing the "injurious falsehood" claim.

> Injurious falsehood cases typically concern derogatory or disparaging communications regarding the title to property or its quality. . . . However, the gist of the tort is some interference with an economically advantageous relationship which results in pecuniary loss rather than an action that directly affects property. [*Kollenberg v Ramirez*, 127 Mich App 345, 350-351; 339 NW2d 176 (1983).]

The factors pertaining to injurious falsehood may often overlap with the factors pertaining to defamation. See *id*. at 353.

Even assuming that an injurious falsehood claim would, in general, be applicable here (where property interests are not involved), the trial court did not err in dismissing the claim. A claim of injurious falsehood requires a showing of actual malice. *New Franklin Enterprises v Sabo*, 192 Mich App 219, 223; 480 NW2d 326 (1991). As discussed above, there were insufficient allegations here regarding malice.

Plaintiff next argues that the trial court erred in dismissing the claim of negligent infliction of emotional distress. We disagree.

This tort generally applies only to a "situation where a plaintiff witnesses negligent injury to a third person and suffers mental disturbance as a result." *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993). Such a scenario is not at issue here, and we are not persuaded by plaintiff's citation to nonbinding cases discussing the tort of negligent infliction of emotional distress. While an older Michigan case did apply the tort to a situation in which the defendant negligently caused an electrical explosion in the plaintiffs' house, and where no negligent injury to a third person was involved, the Court required a "definite and objective physical injury . . . produced as a result of emotional distress proximately caused by [the] defendant's negligent conduct." *Daley v LaCroix*, 384 Mich 4, 6-7, 13; 179 NW2d 390 (1970). We find that plaintiff did not sufficiently allege such a physical injury. We decline to hold, as argued by plaintiff, that the allegation of "sleeplessness," or the general allegation of possible future injuries, was sufficient to meet the threshold.

Plaintiff next argues that the trial court improperly dismissed the case based on MCR 2.116(C)(8) when, in actuality, the complaint set forth legally cognizable claims and more factual discovery was necessary. Plaintiff contends that defendant's motion under MCR

2.116(C)(8) was "nothing but a disguised motion for summary disposition under MCR 2.116(C)(10) . . . ." We disagree.

The trial court dismissed the case *based on the pleadings alone*. See *Smith*, 231 Mich App at 258. Similarly, in our analysis today, we are focusing on the pleadings and accepting plaintiff's factual allegations as true. *Id*. Contrary to plaintiff implication, he was not entitled to discovery when his very pleadings failed to state a claim upon which relief could be granted. As noted in MCR 2.116(I)(1): "If the pleadings show that a party is entitled to judgment as a matter of law, . . . the court shall render judgment without delay." Plaintiff's argument is without merit.

Plaintiff lastly argues that the trial court erred in granting summary disposition to defendants because defendants violated the Bank Protection Act (BPA), 12 USC § 1881 *et seq*. The BPA deals with the implementation of procedures to assist in the identification of bank robbers. See 12 USC § 1882. However, this Court has clearly held that the BPA does not provide for a private cause of action. *Bowden v McAndrew*, 173 Mich App 591, 598-601; 434 NW2d 195 (1988).[2]

The trial court did not err in dismissing plaintiff's case in its entirety. While our reasoning today, on some issues, may differ slightly from that of the trial court, we reiterate that our review of summary disposition motions is de novo, see *Veenstra*, 466 Mich 159, and we note that we will not reverse a trial court if it reaches the correct result for an alternate reason. *Etifia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

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[2] It is possible that plaintiff desires to somehow "bootstrap" the alleged BPA violation onto another of his causes of action. However, plaintiff's causes of action are not viable, and his appellate argument does not make clear how an alleged BPA violation would somehow "revive" them. An appellant may not leave it up to this Court to develop his arguments for him. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).